

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7373

Joint Petition of Vermont Electric Power Company, Inc.,)
Vermont Transco, LLC, and Central Vermont Public)
Service Corporation for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, authorizing the)
construction of the Southern Loop Transmission)
Upgrade Project)

Order entered: 2/28/2008

ORDER RE: MOTION IN LIMINE

On February 1, 2008, Vermont Electric Power Company, Inc. and Vermont Transco, LLC (together, "VELCO") and Central Vermont Public Service Corporation (collectively "Petitioners") filed a motion in Limine to exclude evidence related to easement restrictions, owned by Vermont Land Trust, Inc. ("VLT"), on land owned by Carl and Judy Ferenbach ("the Ferenbachs"). Petitioners contend that the evidence related to the VLT easement is irrelevant because such restrictions:

are subject to VELCO's pre-existing exclusive easement rights to erect and maintain utility lines on the Ferenbach parcel, and any evidence with respect to these subordinate interests will unnecessarily consume valuable discovery and litigation time, waste resources and detract from other critical issues in this docket.

On February 5, 2008, the Ferenbachs filed an objection to Petitioners' motion. The Ferenbachs contend that it is appropriate for the Public Service Board ("Board") to consider the VLT easement because the existence of conserved land adjoining the utility easement is directly relevant to the criteria that must be considered by the Board. Further, the Ferenbachs contend that the question of the impact of the proposed project on the easement would not cause undue delay.

On February 8, 2008, Petitioners filed a response to the Ferenbachs' February 5 letter. Petitioners contend that individual property rights are not relevant to the Board's review under Section 248. Further, Petitioners state that the restrictions imposed by VLT's easements cannot

interfere with the VELCO 1970 easement because the VELCO easement confers exclusive and perpetual right to the encumbered land.

On February 14, 2008, VLT filed a letter objecting to the Petitioners' motion. VLT contends that the interests protected by its easement include those issues that the Board must consider in determining whether to grant a certificate of public good. VLT contends that "additional corridor clearing, construction within the corridor, and corridor maintenance could have impacts on resources situated outside the immediate corridor — the VLT Conservation Easement is directly relevant to any such impacts outside the corridor."

On February 20, 2008, Petitioners filed a response to VLT's February 14 letter. Petitioners contend that VLT lacks standing to reply because the Board has not granted VLT's intervention request and reiterate the statement that private property interests are not relevant to the Board's Section 248 review of the proposed project.¹

On February 22, 2008, the Ferenbachs filed a letter contending that the restrictions contained in the VLT easements "constitute evidence of the public interest being negotiated at arms length between an entity dedicated to conservation of land in Vermont and a private owner, and as such provide insight into the public interest which 'illuminates' the public good which the Board is attempting to discern."

Discussion

No party disputes Petitioners' claim that the restrictions contained in the VLT easement are subordinate to the 1970 VELCO easement with respect to the specific portion of the Ferenbachs' property over which VELCO holds its easement. The Board concludes that Petitioners are correct that the VLT easement does not abrogate the prior VELCO easement.²

1. The Board has not yet ruled on VLT's intervention request. On February 22, 2008, VLT filed additional information in support of its intervention, and the period for comments on VLT's filing has not yet ended. The Board is ruling on the motion in limine now, rather than holding the ruling until reaching a decision on VLT's intervention, because the deadline for the first round of discovery is approaching and the disposition of the motion in limine may affect that discovery.

2. We reach this conclusion only in the context of ruling on the motion in limine within this Board proceeding. We do not, and cannot, issue a binding ruling that conclusively determines the respective parties' property rights; jurisdiction for such determinations rests with the Superior Court, not this Board.

However, Petitioners are requesting an overly broad ruling from the Board in that their motion seeks to exclude "evidence relating to restrictions and plans relevant to easement rights of the [VLT] associated with land owned by [the Ferenbachs]."³ Petitioners appear to be stating that all evidence relating to the VLT easement is irrelevant to this case. While the VLT easement is subordinate to the 1970 VELCO easement as it relates to the strip of land encumbered by the VELCO easement, the VLT easement is still relevant in the consideration of the proposed project's impacts. Criterion 9(K) of Act 250, incorporated through Section 248(b)(5), requires the Board to examine the impact of the proposed project on public investments, and the Board has previously stated that public investments include properties subject to easements purchased by public funds.⁴ If the VLT easement extends beyond the property covered by the VELCO easement, and was purchased in part by public funds, the impacts of the proposed project on the VLT easement outside the VELCO easement must be considered by the Board under criterion 9(K).

Furthermore, even for the specific lands subject to the VELCO easement, recognition of the subordinate nature of the VLT easement has limited practical impact in this proceeding. The Board must still examine the impacts of the proposed project on the land encumbered by the VELCO easement under the Section 248 criteria, including the impacts on aesthetics, wetlands, and other environmental criteria.⁵

Petitioners' motion in limine is granted in part. Evidence regarding the property rights associated with the VLT easement on the specific property subject to VELCO's 1970 easement is excluded.

SO ORDERED.

3. Petitioners' Motion at 1.

4. See Docket 6860, Order of 1/28/05 at 165-166.

5. Additionally, as previously noted any disputes regarding property rights as they relate to the VELCO and VLT easements would need to be resolved by the Superior Court rather than this Board.

Dated at Montpelier, Vermont, this 28th day of February, 2008.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: February 28, 2008

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)